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In the Supreme Court of the United States

October Term, 1961

[redacted]

Petitioner,

v.

United States of America

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 278

WILLIAM PRESSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 404–408) is reported at 292 F. 2d 171. The opinion of the district court (R. 326–328), incident to its denial of a renewed motion for judgment of acquittal or in the alternative for a new trial, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1961 (R. 408). The petition for a writ of certiorari was filed on August 1, 1961, and was granted on October 23, 1961 (R. 409; 368 U.S. 886). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was convicted of corruptly obstructing and endeavoring to obstruct an inquiry by a Senate committee in that he mutilated an invoice and concealed a memorandum which the committee had subpoenaed from a labor organization and which a committee investigator had preliminarily examined at the union offices. The following questions are presented:

1. Whether the likelihood that the subpoena directed to the labor organization for these records had been filled in by an investigator employed by the committee, over the signature of the committee chairman, immunizes petitioner from prosecution.

2. Whether the records were subpoenaed and sought for a legitimate legislative purpose, and, if so, whether the prior examination of the documents and the recording of some of their contents by an investigator for the committee bars the prosecution.

3. Whether the evidence was sufficient to support the conviction.

4. Whether petitioner was denied a fair trial by the admission of testimony by the chairman of the committee.

5. Whether the summation of the prosecutor was fair.

STATUTE AND RESOLUTION INVOLVED

Section 1505 of Title 18, U.S.C., the Act of January 13, 1940, 54 Stat. 13, as amended, provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before

any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein, or;

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Senate Resolution 74, 85th Congress, agreed to January 30, 1957 (103 Cong. Rec. 1264–1265; Govt. Ex. 5–C, R. 312–313), provided in pertinent part:

Resolved, That there is hereby established a select committee which is authorized and directed to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been, engaged in the field of labor-management relations or in groups or organizations of employees or

employers to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities.

* * * * * *

SEC. 4. For the purposes of this resolution the select committee is authorized as it may deem necessary and appropriate to (1) make such expenditures from the contingent fund of the Senate; (2) hold such hearings; (3) sit and act at such times and places during the sessions, recesses, and adjournment periods of the Senate; (4) require by subpoena or otherwise the attendance of such witnesses and production of such correspondence, books, papers, and documents; (5) administer such oaths; (6) take such testimony, either orally or by deposition; (7) employ on a temporary basis such technical, clerical, and other assistants and consultants, and (8) with the prior consent of the executive department or agency concerned and the Committee on Rules and Administration, employ on a reimbursable basis such executive branch personnel as it deems advisable; and further with the consent of other committees or subcommittees, to work in conjunction with and utilize their staffs, as shall be deemed necessary and appropriate in the judgment of the chairman of the select committee.

* * * * * *

STATEMENT

On March 23, 1960, an indictment was returned in the United States District Court for the Northern

District of Ohio charging that petitioner, the president of Joint Council No. 41 of the International Brotherhood of Teamsters, obstructed and endeavored to obstruct the due and proper exercise of the power of inquiry of a Senate committee. The indictment alleged that the Senate Select Committee on Improper Activities in the Labor or Management Field was conducting an investigation and study of the extent of criminal or other improper activities in those areas and that, between September 9 and September 13, 1958, petitioner had mutilated a certain invoice and had concealed and withheld from the committee an envelope bearing the notation "Christmas List" and a memorandum containing a list of names with various items of merchandise or amounts of money written next to them, knowing that these records belonged to the Council, that these records were relevant to the subject matter of the committee's inquiry, and that the production of these records had been required by virtue of a subpoena served on the Council on March 21, 1958 (R. 5–7). After a jury trial, petitioner was found guilty and was sentenced to eight months imprisonment (R. 330).

A. THE COMMITTEE'S INVESTIGATION

The Senate Select Committee on Improper Activities in the Labor or Management Field was directed by its authorizing resolution of January 30, 1957 (Exhibit 5-C; R. 18, 312–313; S. Res. 74, 85th Cong., *supra*, pp. 3–4) "to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been

engaged in in the field of labor-management relations or in groups or organizations of employees or employers to the detriment of the interests of the public, employers or employees and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities." The committee was authorized to require "by subpoena or otherwise" the production of documents and to employ personnel to assist it (R. 312).[1] The committee adopted a rule directing that subpoenas should be issued by its chairman (Exhibit 6; R. 313).

After its organization, the committee employed a staff which included a chief counsel and professional investigators. In performing its legislative function, the committee issued subpoenas and examined records which it thought might be pertinent. Under the direction and supervision of the chief counsel, the investigators were given the task of interviewing prospective witnesses, arranging to obtain subpoenaed documents, and examining documents that might be of interest to the committee. The committee also established field offices in different sections of the country, including Cleveland, where its staff examined records locally as a convenience to all parties concerned (R. 20–25, 28). The investigators, upon their return to Washington, wrote reports to the committee, based upon their work, which covered the information obtained (R. 90).

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[1] The life of this committee was continued by resolution beyond the date of the specific acts alleged in the indictment. Its initial extension was by Senate Resolution 221, 85th Cong., 2d Sess. (Exhibit 5–A, R. 309–310).

The investigation by the committee and its staff covered possible misuse and misappropriation of union funds improperly to influence public officials and to enrich union officials, and also the possible domination of unions by persons outside of the labor movement (R. 20–21). Among the subjects of inquiry was the possible association of Teamsters Union officials with reputed racketeers (R. 44).

On March 24, 1958, the committee filed an interim report containing special findings with regard to the Teamsters Union, and recommending, in very general terms, legislation to regulate and control union funds and to insure union democracy (R. 25–27; 388–403).[2]

During 1958, the committee conducted investigations of various locals and affiliates of the Teamsters Union in Ohio and, in connection with its investigation, issued subpoenas for the production of records of labor organizations (R. 28–29). On March 21, 1958, a committee subpoena, directed to Joint Council No. 41, International Brotherhood of Teamsters, was served on petitioner personally (R. 57–58). This subpoena (Exhibit 9) ordered the Joint Council to appear before the committee at Room 101, Senate Office Building, Washington, D.C., and produce certain records from January 1, 1949 to January 1, 1958. It specified, *inter alia*, the cash disbursement book, cancelled checks, check stubs, paid bills, memoranda and any other records relating to the Joint Council (R.

[2] S. Rep. No. 1417, 85th Cong., 2d Sess. (1958). This report, Exhibit 7, was not permitted to go into the jury room and was not examined by the jury (R. 212–213).

314).[3] On April 1, 1958, a second subpoena was served upon the Joint Council calling for the production of records, noting that "[p]roduction of records in Washington, D.C., [would] be waived" if the records were made available in Cleveland, Ohio[4] (R. 88–89, 103–104). Both subpoenas were signed by Senator McClellan, the chairman of the committee. The March subpoena had in all likelihood been signed in blank by Senator McClellan, and had been filled in by the committee investigators (R. 83–84, 89). The committee and the union agreed that records subpoenaed would be turned over to a committee office in Cleveland (R. 58–59, 86, 147). Pursuant to this arrangement, records were produced but some records demanded by the subpoenas, such as the correspondence files and memoranda of Joint Council No. 41, were not turned over to the committee (R. 63).

In August 1958, while the committee investigation in Ohio was in progress, the committee became interested in the relationship between the Teamsters Union and former Senator George Bender, the head of a so-called anti-racketeering commission which had been established by the Teamsters to investigate corruption and improper practices of its own officials.

[3] Its date of issuance was listed as March 19, 1957, instead of March 19, 1958, because of a typographical error (R. 102, 105).

[4] The April subpoena (Exhibit A) called for the production of all records from January 1, 1949 to date, specifying the same category of records as the March subpoena. In lieu of the language "relating to Joint Council No. 41" it substituted "relating to Joint Council No. 41 Welfare Records, Building Association Records, Special Fund Records and the Teamsters Year Book" (R. 318).

The committee had information indicating a past association between former Senator Bender and the Teamsters (R. 62). A committee investigator, Walter J. Sheridan, who had served the March subpoena upon petitioner and had visited Ohio from time to time in connection with the Teamster investigation (R. 56–57, 90), was instructed to make a study of this relationship (R. 34, 60–62).

Much of this testimony concerning the working of the committee was developed through the testimony of its chairman, Senator McClellan. The details of his testimony and the objections thereto are discussed in our Argument, *infra*, pp. 36–43.

B. THE MUTILATION AND CONCEALMENT OF THE RECORDS

On September 9, 1958, Mr. Sheridan, who had examined some of the records in the field office and who knew that some of the subpoenaed records had not been produced (R. 93–94), went to the offices of Joint Council 41 and asked to see the correspondence files and memoranda which had not been produced. Petitioner permitted him to examine these files which were located in a file cabinet in his secretary's office. Sheridan found an envelope marked "Xmas List," containing a Rudolph Deutsch Company invoice showing the purchase by the Council in December 1955 of eight champagne buckets at $100 each, for eight individuals listed as Bender, Beck, English, Hoffa, Brennan, Connell, Bliss and Dorfman. He also examined a yellow sheet of paper listing the eight names found on the voucher and additional names, together with amounts of money or indications of Christmas

gifts next to the names. Sheridan made notes (Exhibit 10) of the invoice and obtained the first initial of Bender and Bliss from the yellow memorandum (R. 63–64, 66, 68–69, 156–157, 315). He told petitioner that he would like to take four files with him, one of which contained the invoice and the yellow paper, but consented to leave the files in petitioner's possession for photostating (R. 63, 70, 171).

About September 11, 1958, petitioner, who had purchased the champagne buckets, contacted Charles Schaeffer, the salesman who had made the sale, and asked him if he "had any records of anything that had been sold to him or the Teamsters Union in the form of gifts," making particular reference to the champagne buckets. After telephoning the Deutsch Company, the salesman notified petitioner that there were no such records available (R. 208–209, 121).[5]

On September 13, 1958, when Sheridan returned for the four files, petitioner obtained them from his own office and handed them to Sheridan, stating that he had not touched them. Sheridan, noting that the invoice had been torn, and that the envelope and the memorandum containing the names of the donees were missing, told petitioner that he (Sheridan) should not have trusted him (petitioner). Petitioner responded, "You have your job to do, I have mine" (R. 71–73, 96–97). The invoice also contained alterations which had been made by an erasure (R. 133).

[5] On September 13, 1958, after leaving petitioner's office, Mr. Sheridan visited the seller of the buckets. The salesman had telephoned the company one or two days prior to this visit (R. 75, 100, 121, 209).

All persons who had access to the files denied that they had tampered with the records (R. 173–174, 192, 194).[6]

C. THE DEFENSE

Except for six character witnesses (R. 271–285), petitioner was the only defense witness. He admitted the visits by Sheridan (R. 225–232) but he denied that he had mutilated the invoice or removed anything from the files (R. 225, 232). He testified that he had traveled to Washington between Sheridan's two visits, leaving on September 9 a few minutes after Sheridan's departure and returning on the 12th, and that while in Washington he had seen James R. Hoffa (R. 229, 237–244).

Petitioner acknowledged knowing that the committee investigation could affect the Teamsters and conceded that he was generally interested in the committee findings (R. 254–255). He had heard and had read in the newspaper that the committee had made reports to the Senate and had made some special findings with respect to the Teamsters (R. 255–256). He had also read the committee statements concerning Dave Beck, James R. Hoffa and Bert Brennan in the newspapers (R. 257–258). He had general knowledge

[6] In August 1958, the Ohio Conference of Teamsters, headed by petitioner, had retained Senator Bender and sent him a check for $1,000 signed by petitioner (R. 199–200). When Senator Bender was appointed chairman of the "clean-up commission" of the Teamsters' International Union, he returned the check, explaining in a letter that this position might create a conflict of interests (R. 201–202). On September 9, 1958, petitioner forwarded this letter to the secretary-treasurer of the conference (R. 202).

of the court proceedings involving the establishment of the Board of Monitors to oversee the Teamsters (R. 258). He had made a statement that the Monitors intended to eliminate any Teamsters official associated with anyone with a bad reputation and that the Monitors might be after his job (R. 258–262). Petitioner also knew of and was interested in the "clean-up commission" headed by former Senator Bender, and was aware of the committee investigation involving the relationship between Senator Bender and the Teamsters organization (R. 263–265).

D. THE REBUTTAL

The government introduced telephone company records which reflected that, on September 11, 1958, two long distance person-to-person phone calls had been made by James R. Hoffa, in Washington, D.C., to petitioner in Cleveland (R. 286–287).

E. THE INSTRUCTIONS

The prosecution requested the judge to tell the jury as a matter of law (1) that the committee was pursuing a legitimate legislative purpose in inquiring into improper activities in the labor-management field, and (2) that the invoice and separate list of names were documents which bore a reasonable relation to the subject matter of the committee's inquiry and were relevant to it. Although petitioner requested the court to instruct the jury on several subjects "as a matter of law," he offered no suggestion on the relevancy issues (R. 386–387).

The court accepted the first part of the government request but deemed the second part to be a fact issue.

and instructed the jury accordingly (R. 294, 303, 304, 326–327). The court instructed the jury on this issue as follows (in part):

> Congress is within its powers and was within its powers and function to conduct inquiries and investigations into subjects upon which it is empowered by the Constitution to legislate. It was acting within the scope of its powers in conducting an inquiry in respect of unlawful activities in labor-management relations. However, its inquiries are required to have a reasonable relation to the subject of the inquiry, and the evidence should be relevant to the subject and purpose of such inquiry and investigation [R. 294].
>
> * * * * * * *
>
> It will be for you to say from the evidence on the subject whether the sending of the gifts by the Joint Council 41 to public officials, political leaders and other controversial persons of supposed influence, or questionable reputation, such as done by Joint Council 41, through the defendant, its President, was a type of practice relevant to the inquiry and investigation being conducted by the Committee under the Senate Resolution; whether the defendant, with knowledge of the function and purpose of the Committee, and of the relevancy of the names of the recipients of the gifts admitted to have been ordered and paid for by his Union, defaced the Deutsch invoice by tearing off a portion containing the names of the recipients, and withheld the names of the Christmas List with the corrupt and unlawful intent and purpose of obstructing and imped-

ing the Committee's inquiry. That the Committee might have secured these names and other information relative to the gifts by other means is not material and would not furnish absolution to defendant if you find that he did what the indictment charges.

If you believe from the direct and circumstantial evidence, beyond a reasonable doubt, that defendant did deface, tear, or withhold the records referred to and if you believe that he did, and did it with knowledge that they were relevant to the inquiry being conducted by the Committee of Congress and subpoenaed for that purpose, and that they were defaced or withdrawn by him wilfully and with the purpose corruptly to obstruct and impede the Committee from obtaining the information contained in the records, the defendant would be guilty of the offense charged. If you do not so find he would be entitled to acquittal [R. 304].

When counsel for petitioner was asked for exceptions to the court's charge, he announced he had "Nothing" (R. 307).

SUMMARY OF ARGUMENT

I

The proof showed that petitioner deliberately destroyed union records with knowledge that the records were sought by a Senate committee and were pertinent to its inquiry.

A. The validity of the subpoena directed to the union is irrelevant to this case. The statute, 18 U.S.C. 1505, proscribes any endeavor to obstruct a

committee inquiry. It is not limited to an interference with records demanded under compulsory process but covers records sought voluntarily without such process. It is sufficient to constitute an offense that petitioner destroyed the records with knowledge that the specific records had been requested by an authorized agent of the committee for examination by the committee.

Moreover, the records were under legal subpoena at the time petitioner committed his corrupt acts. The likelihood that a committee investigator filled in a subpoena signed in blank does not invalidate the process if the investigator's action was ratified by the committee and acquiesed in by the union prior to the time particular records were demanded. In the present case the union and the committee agreed, subsequent to the initial issuance of the subpoena and prior to the investigator's specific request for the records now in issue, that these records would be produced before a field office established by the committee. At the very minimum, this arrangement establishes ratification by the committee and acceptance by the union. Even aside from the matter of ratification and acceptance of the subpoena, the subpoena was in an important sense the process of the committee, for it called for production of designated union records before the committee in Washington and not before the investigator. The fact that the subpoena may have been filled out by the investigator could not, therefore, result in denying the union the important right to contest the validity of the subpoena before the committee.

B. The custodian of records has no right to determine what documents demanded by a congressional committee he will preserve for congressional scrutiny. Since the statute embraces any endeavor, successful or otherwise, to block a committee's inquiry, it is no defense that the records were destroyed after a committee investigator had noted some of the information contained in the records. The committee was not obliged to rely upon secondary testimony when the original documents were available. Moreover, this conviction does not rest merely upon the mutilation of records already noted by a committee employee, but upon the concealment of a paper, the contents of which the committee was unable to obtain.

C. The records were sought for a legitimate legislative purpose. The committee was duly conducting an inquiry into the misuse of union funds improperly to influence public officials and to enrich union officers. Evidence of payments or gifts to public officials or union officers was relevant to this inquiry. The committee could not be limited to examining documents which merely showed that gifts were made without designating the recipients: it was entitled to probe the relationship between the union and the recipients. Furthermore, the names were relevant to whether the Teamsters were making a good faith effort "to clean house" or whether legislation was the only answer to the misuse of union funds.

D. The jury was properly allowed to resolve petitioner's guilt on ample direct and circumstantial evidence. Circumstantial evidence, like direct evi-

dence, may support a guilty verdict if it justifies a jury in finding guilt beyond a reasonable doubt.

II

A. There was no error in taking the testimony of Senator McClellan before the jury. The trial judge believed that a particular issue of pertinency—whether the sending of gifts by the union was relevant to the committee's inquiry—was a jury question. Petitioner never objected to this procedure and never suggested that pertinency was solely a question upon which only the court should act. There was nothing in the testimony of Senator McClellan that would have confused the jury or biased them in deciding the contested factual issue—whether petitioner destroyed and concealed records. Moreover, in the absence of objection, the trial court has discretion in not excluding the jury even when hearing evidence on an issue entirely for the court's determination.

B. In any event, even if the judge alone had heard the evidence on and decided the issue of pertinency, it would have been necessary to present to the jury most of the facts developed in the Senator's testimony, including the part about which petitioner most complains. Since the government was required to prove to the jury that an inquiry was in progress and that petitioner had notice of such investigation, the jury had to be informed, either by evidence or by peremptory instruction, of the nature of the inquiry. Beyond this, the major portion of Senator McClellan's testimony was properly presented to the jury to show petitioner's motive. It was relevant on this issue to

prove that, to petitioner's knowledge, the committee was trying to ascertain whether the union was using its funds to purchase expensive Christmas gifts and whether Senator Bender had a prior relationship with the Teamsters. The first step in proving this knowledge was to establish that these were the aims of the inquiry. In addition, Senator McClellan's testimony as to the public acts of the committee itself tended to prove petitioner's knowledge and motive. The jury could infer that, in the six-month interval between the time that the subpoena had been served upon petitioner and the investigator's second visit (or at the least, between the investigator's two visits), the petitioner, as the head of a union under investigation, acquainted himself with the subject matter of interest to the committee. While petitioner in his own testimony did not deny that he had such knowledge, the government could not know this when it was presenting its affirmative case.

C. An examination of the specific testimony of the Senator likewise shows that it was properly before the jury, both as to pertinency and as to motive:

1. Both to establish a possible motive for petitioner to destroy or conceal union records and to prove the pertinency of the records sought, it was necessary to show that the committee was empowered to investigate the use of union funds for improper purposes. The general Senate resolution authorizing an investigation of criminal and other improper activities by unions was not the only evidence admissible on these

issues. The government was entitled to prove by testimony of persons familiar with its investigations, such as the committee chairman, the specific scope of the inquiry and to indicate that, by the filing of an interim report of the committee, Congress and the public were made aware of the nature of the inquiry.

2. Sheridan's testimony before the committee was not admitted to bolster his subsequent testimony at the trial. Rather, it was relevant to prove that Sheridan, in requesting the documents, was acting for the committee and that the information sought had a reasonable relationship to the matter under investigation.

3. The identity of the recipients of gifts was not offered to assail petitioner's character. It was introduced because it was relevant on the issue of pertinency and on petitioner's motive to destroy the papers. Contrary to petitioner's assertions, only one recipient was described as a person of bad repute.

4. Testimony of Senator McClellan that destruction and concealment of the records would have hampered the committee was not prejudicial because this testimony bore only on pertinency, an issue which was proved by overwhelming evidence.

III

The prosecutor's closing argument was not inflammatory. It was based upon proper inferences from the evidence. Moreover, petitioner made no objection to the summation.

ARGUMENT

I

THE EVIDENCE SUPPORTS PETITIONER'S CONVICTION FOR CORRUPTLY OBSTRUCTING A SENATE INQUIRY

Introduction

Section 1505 of Title 18 U.S.C. provides in relevant part that "[w]hoever corruptly * * * obstructs, or impedes, or endeavors to * * * obstruct, or impede * * * the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by * * * any committee of either House * * * Shall be fined not more than $5,000 or imprisoned not more than five years, or both." There are thus three necessary elements of the offense:

1. *A Congressional committee must be conducting a duly authorized inquiry or investigation.* This element, which is hardly contested, is plain beyond dispute in the present case.

2. *The defendant must have obstructed or impeded or must have endeavored to obstruct or impede the proper exercise of the committee's power of investigation.* We submit that actual obstruction was established by proof that (a) the petitioner intentionally destroyed and concealed documents which were highly relevant to the committee investigation; and (b) the loss of these documents both deprived the committee of relevant information it would otherwise have had and prevented the committee from having the best available evidence of that part of the information which it later obtained from other sources. An endeavor to obstruct or impede the committee's power of investigation was established by proof that

the petitioner intentionally destroyed and concealed documents which he knew had been sought by the committee both through the use of a subpoena (whether valid or defective) and through the personal request of an authorized committee investigator.

3. *The defendant must have acted with corrupt or guilty knowledge or intent that his action will obstruct the committee investigation.* This element of the offense was fully established by proof that the petitioner concealed and destroyed records which bore relevantly on what he knew to be the subject of the committee investigation, which were the subject of a committee subpoena the validity of which he never challenged, which had been requested by a committee investigator, and which he knew he had been permitted to keep, only temporarily, for the purpose of having the records photostated.

Thus each of the explicit elements of the crime was established by substantial evidence at petitioner's trial. In addition both parties assumed that a fourth necessary element of the crime was that the defendant's obstruction or attempted obstruction must have involved records which were in fact pertinent to the committee investigation.[7] This too was completely established by the proof at trial. See *infra*, pp. 31–33. On the basis of the government's proof the jury found

[7] For purposes of the present case we shall continue to treat the pertinency of the documents as a separate and necessary element of the crime whether or not actual pertinency, as opposed to a reasonable basis for the committee to believe the documents pertinent, is a necessary element of a prosecution under 18 U.S.C. 1505.

that petitioner deliberately destroyed and concealed union records which he knew were relevant to a subject properly under inquiry by the Senate Select Committee on Improper Activities in the Labor or Management Field. None of petitioner's contentions affords any excuse for the wilful obstruction shown in this case.

A. A defect in the subpoena directed to the union would afford no defense to the petitioner. In any event, the records were under valid subpoena at the time petitioner did his corrupt acts.

Petitioner argues that although he had agreed, as president of the union, to turn the records over to the committee after an investigator had made a preliminary examination, his act of destroying or concealing the records, so that the committee could never get them at any time, may be excused on the ground that the original subpoena was invalid. The short answer is that no defect in the subpoena would excuse petitioner's deliberate destruction of the records. Furthermore, the subpoena was valid.

1. The obstruction statute is not limited to an interference with records sought under compulsory process; it covers records produced or displayed without such process. If a committee investigation is in process and records are destroyed or concealed with knowledge that they have been labeled for examination by the committee, the statute is violated. The committee's power of inquiry is not dependent upon compulsory process. A committee can both employ

the subpoena process and depend upon voluntary cooperation of witnesses and prospective witnesses. It can employ a staff of investigators to assist it in its labors. Indeed, in the instant case, the committee was specifically granted authority by its authorizing resolution to require by "subpoena or otherwise" the attendance of witnesses and the production of documents. See *supra*, pp. 4, 6.

It is clear that the statute involved, 18 U.S.C. 1505, is intended to and does apply to interference with a committee's attempt to obtain relevant material although no valid subpoena is outstanding. As enacted in 1940, the statute made applicable to congressional investigations and administrative proceedings the protection long afforded to judicial proceedings by the statute popularly known as the obstruction of justice statute, 18 U.S.C. 1503.[8] The purpose of these companion obstruction statutes is not only to protect witnesses and parties but to prevent affirmative action which corruptly interferes and endeavors to interfere with investigations of Congress and proceedings before courts or agencies. *United States* v. *Russell*, 255 U.S. 138; see also *Samples* v. *United States*, 121 F. 2d 263, 265–266 (C.A. 5). In cases arising under the related

[8] See H. Rept. 1143, 76th Cong., 1st Sess.; S. Rept. 1135, 76th Cong., 1st Sess. The two statutes were considered together in 1945, when their protection was extended to former witnesses. See S. Rept. 225, 79th Cong., 1st Sess.; H. Rept. 597, 79th Cong., 1st Sess. Section 1503 is a descendant of section 2 of the Act of March 2, 1831, 4 Stat. 488. See *Nye* v. *United States*, 313 U.S. 33, 44–46.

obstruction of justice statute involving tampering with witnesses, it has uniformly been held that an offense may be committed even though the acts of the defendant occur prior to the issuance or service of a subpoena, or, in the case of a voluntary witness, even though no subpoena is ever issued. *Broadbent* v. *United States*, 149 F. 2d 580, 582 (C.A. 10); *Samples* v. *United States*, 121 F. 2d 263, 266 (C.A. 5); *Odom* v. *United States*, 116 F. 2d 998, 998-999 (C.A. 5), reversed on other grounds, 313 U.S. 544;[1] *Heinze* v. *United States*, 181 Fed. 322, 324 (C.A. 2); *United States* v. *Solon*, 138 F. Supp. 812, 814-815 (S.D. N.Y.).

Petitioner's basic misconception stems from his attempt to argue the case as if it involved the obligation of the Joint Council to produce the records rather than the duty of petitioner not to interfere with the documents. The statute does not require that the documents mutilated or concealed be under subpoena. The statute is designed to protect witnesses and documents from all varieties of corrupt interference. See *Smith* v. *United States*, 274 Fed. 351, 353 (C.A. 8). Obviously, when one destroys records in which he knows a committee is interested, he impedes the inquiry, regardless of whether a subpoena has been issued or, whether if is valid. If a subpoena has not been issued, it can be issued; if the subpoena is defective, the defect can be corrected.

[1] This case was reversed on a confession of error by the Solicitor General on the ground that the instructions allowed a conviction on an objective rather than a subjective standard of knowledge. See Memorandum for the United States, No. 827, O.T. 1940.

But once the records are destroyed, they are beyond the reach of the committee forever, no matter how valid the process.

The point can be simply illustrated. A Congressional committee could, if it chose, adopt the practice of first asking the custodian of desired records to turn them over voluntarily and of issuing a subpoena only if the custodian refused. If a custodian who had been asked to turn over certain records refused to do so without a subpoena and then destroyed the records before a valid subpoena could be issued, he would be guilty of corruptly obstructing the processes of the committee. The situation in the present case differs from such a hypothetical situation only in ways that make petitioner's guilt more certain. Petitioner was aware that the committee was attempting to obtain the union invoice and memoranda in his possession. If he had refused to furnish these without being served with a valid subpoena, he would not have been free to destroy the documents before the committee could serve him with a valid subpoena. Petitioner's failure to object to the subpoena with which he had been served six months earlier can in no way result in his obtaining a right to obstruct the committee's investigation. Cf. *United States* v. *Bryan*, 339 U.S. 323, 332; *McPhaul* v. *United States*, 364 U.S. 372.

Petitioner's knowledge that the documents were wanted by the committee, and that his continued custody was temporary, was clearly established by the evidence. That is enough to render a destruction or concealment of the documents a violation of the

statute, whether or not a valid subpoena had been issued.

2. In any event, the records were under valid subpoena at the time that petitioner destroyed them. It is true that there is no direct evidence that the committee issued the subpoena, except for the signature of Senator McClellan. However, the circumstances show that the subpoena was in fact that of the committee.

a. Since petitioner takes a rather narrow view of the facts bearing on this question, we recapitulate some of the relevant evidence. Senator McClellan testified that the committee undertook an investigation of various Teamsters unions in Ohio and issued subpoenas and employed investigators in connection with this inquiry (R. 28–29). On March 21, 1958, the Joint Council was served with a subpoena directing it to produce certain records before the committee in Washington (R. 57–58). Sheridan, a committee investigator, testified that in all likelihood this subpoena had been signed in blank by Senator McClellan, the committee chairman, and had been filled in by the committee investigators (R. 83–84, 89). After service of the subpoena, the union agreed with the committee to produce the subpoenaed records at the committee's field office in Cleveland (R. 58–59). The records involved in this case, although covered by the subpoena, were not produced (R. 93–94). On September 9, 1958, Sheridan visited the union office and was permitted by petitioner to examine subpoenaed records which had been turned over to the committee (R. 63). The committee investigators (whose employment was

authorized by Congress) made frequent reports of their examinations to the committee (R. 80). Senator McClellan was aware of the fact that records were being produced for the committee through the Cleveland field office (R. 29).

b. The basis for petitioner's argument that the subpoena was invalid is Sheridan's testimony that the subpoena had in all likelihood been signed in blank by the committee chairman. But the evidence does not show that issuance of a subpoena to the Joint Council was not authorized by Senator McClellan. To the contrary, the evidence suggests there was such authorization, for Senator McClellan testified that he was aware of the fact that records were being produced for the committee through the Cleveland office (R. 29). Even more significantly, the evidence plainly indicates that the subpoena was ratified by the committee and any objections to it were waived by the union at a time prior to the destruction or concealment of the documents now in issue. Since the subpoena ordered the union to produce its records before the committee itself in Washington, and production of the documents elsewhere required the consent of the witness and the committee, the arrangement for production in Cleveland establishes (at the minimum) such ratification of the subpoena by the committee and acceptance of the subpoena by the union.

c. Even without the ratification we do not believe that the fact that the subpoena was signed in blank serves to render the subpoena invalid as not being the process of the committee. The subpoena called

for production of records before the committee, not before the investigator who filled in the details of what was to be produced. Hence the person subpoenaed, in this case the union, had full opportunity to appear before the committee, the body authorized to issue subpoenas, to contest the validity of all or any part thereof. It was the committee, not the investigator, who would rule on the validity of any such objections. Thus in reality, as well as form, the subpoena was the process of the committee. The situation here is similar to that which pertains with respect to judicial subpoenas in the federal courts which are filled in by lawyers for the parties. Rule 17(a), F.R. Crim. P. Objections to the validity and scope of such subpoenas may be made to the court and are ruled upon by the court. The process is that of the court, disobedience to which is punishable as contempt, even though the court did not originally decide what documents should be subpoenaed. The important feature, if compulsory process is used, is that a witness have a right to contest the subpoena before a body having authority to rule. See *Fleming* v. *Mohawk Co.*, 331 U.S. 111 at page 123 (concurring opinion of Mr. Justice Jackson). That right existed with respect to the subpoena in this case. Petitioner's reliance on *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, is misplaced. The Court there held that, under the Fair Labor Standards Act, the Administrator of the Wage and Hour Division of the Department of Labor was not given statutory authority to delegate to subordinates his power to sign and issue subpoenas. In this case, no attempt was made to give the investigator

power to issue subpoenas for production of records before the investigator. The subpoena, signed by the chairman, called for production of records before the committee. Thus, even if the investigator filled in the details, the process was that of the committee.

B. *The fact that an investigator had previously noted some of the information contained in the records does not show that petitioner did not obstruct or endeavor to obstruct the inquiry by destroying the records.*

1. Petitioner, who destroyed records which he knew the Senate committee wished produced after they had been left in his hands for photostating, argues that his act in preventing the records from getting to the committee did not block the inquiry because the investigator had noted some of the information before the act of destruction occurred. That an actual document available for study and presentation to other persons in the future, if necessary, is of more value to any investigative body than the recollection of its investigator, no matter how reliable, as to what that investigator has seen in his examination of documents seems to us so self-evident that we think the point hardly merits discussion. The fact that Sheridan had copied the names from the invoice does not excuse petitioner's act. The committee was not obliged to rely on secondary evidence, and to risk the potential disputes which might arise concerning the contents of the original documents, when the original document was available.

Furthermore, petitioner ignores the fact that part of the information sought by the committee was not

obtained elsewhere. His conviction does not rest on the mutilation of the invoice alone. The memorandum containing a more inclusive list of gift recipients was concealed. It contained names additional to the ones which Sheridan had noted in his preliminary examination. The committee was not able to identify these names.

2. Petitioner clearly tried to frustrate the committee's investigation even if he did not succeed. The jury was justified in concluding that petitioner tried to prevent the committee from obtaining the names of the recipients of the champagne buckets only after ascertaining that such information could not be obtained elsewhere. See the Statement, *supra*, p. 10.

The statute punishes not only a person who obstructs the inquiry, but any person who corruptly "endeavors to influence, obstruct, or impede * * * the due and proper exercise of the power of inquiry". It is therefore immaterial whether the inquiry is in fact obstructed or impeded. As this Court said in *United States* v. *Russell*, 255 U.S. 138, 143:

> * * * The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. * * *

See also *Bosselman* v. *United States*, 239 Fed. 82, 86 (C.A. 2); *Thomas* v. *United States*, 15 F. 2d 958 (C.A. 8); *United States* v. *Polakoff*, 121 F. 2d 333 (C.A. 2); *Broadbent* v. *United States*, 149 F. 2d 580, 581 (C.A. 10); *Catrino* v. *United States*, 176 F. 2d 884

(C.A. 9); *Anderson v. United States*, 215 F. 2d 84 (C.A. 6); *United States v. Siegel*, 152 F. Supp. 370 (S.D.N.Y.), affirmed, 263 F. 2d 530 (C.A. 2), certiorari denied, 359 U.S. 1012.

C. The evidence disclosed that the records were sought for a legitimate legislative purpose.

Petitioner contends that the mutilation of the invoice and the concealment of the memorandum with its list of Christmas gift recipients involved documents which were not pertinent to any "question under inquiry" in that it was unnecessary for the committee to obtain the names of the individuals who had received the gifts. He asserts that the full legislative purpose was satisfied by union records which shewed the amount of money spent for Christmas gifts (Br. 11, 12, 39). The record shows, however, that the committee had a legitimate interest in the names.

1. While the statute does not specifically make pertinency an element of the offense, all parties have assumed for purposes of the present case that the effort to alter and conceal records to accomplish the proscribed purpose must involve documents which bear a reasonable relationship to the subject of the inquiry and were reasonably relevant to the inquiry.

2. The issue of pertinency can, as petitioner recognizes (Br. 23), be at least twofold: (1) the general question of the committee's powers to inquire into a certain subject matter; and (2) the specific question whether the particular information sought is relevant to that subject matter. Both aspects of pertinency were amply met in this case.

Petitioner does not and cannot deny that the committee was pursuing its proper function in examining into the general field of improper activities in labor-management relations (R. 212–213). As an integral part of that investigation, the committee was duly conducting an inquiry into the misuse of unions funds improperly to influence public officials and to enrich union officials. This was amply disclosed by Senator McClellan's testimony (R. 20–21). The subpoena was issued, and the Cleveland field office established, to further this study.

Evidence of payments or gifts to public officials or union officials or others would obviously be relevant to this inquiry. Here the Deutsch invoice showed a gift to a United States Senator, to union officials and to others; the concealed memorandum showed gifts to others now unknown. Clearly the use of union funds, amassed from contributions of the members, to buy expensive Christmas gifts for public officials and labor leaders was a matter of legitimate interest to the committee. Congress was considering new labor legislation for years and had evinced increasing concern that union dues not be misused. See the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519.

3. Petitioner says that it was sufficient that the committee knew that gifts were made and that it was not entitled to the details of such gifts. But the legislature has a right to determine the various kinds of data that it deems necessary to collect. Congress did not have to bring its inquiry to a close because it had been furnished cancelled checks and a cash disburse-

ment book showing the total amount of money disbursed to the Deutsch Company. Congress had the legitimate right to seek the identity of the recipients of the champagne buckets and the identity of other donees of the Joint Council's beneficence. The identity of the names would serve to afford a reasonable basis for calling those listed, as witnesses, in order to probe their relationship with the union and its officials.

Even more specifically, as a phase of the overall investigation, the committee was justified in inquiring whether the Teamsters were making a good faith effort "to clean house" or whether some form of legislation was required. This was the immediate purpose of Sheridan's examination of the records. Petitioner had no right to attempt to frustrate either phase of the committee's inquiry.

D. The direct and circumstantial evidence was sufficient to prove petitioner's guilt.

Petitioner makes a general argument concerning the sufficiency of the evidence which hints that other people may have mutilated and concealed the documents involved. The jury resolved this question against him on ample evidence.

1. Sheridan gave direct testimony that, in examining certain files in petitioner's office on September 9, 1958, he noted the invoice with its list of eight names and examined the memorandum with its additional names. He related that when he returned on September 13, 1958, the invoice had been mutilated so as to remove the names and the memorandum was miss-

ing. When Sheridan said he should not have trusted petitioner, the reply that petitioner gave was that he had his job to do. All other persons who had an opportunity to do this deed testified that they had not done it. Petitioner's specific interest in this particular invoice is indicated by his call to the salesman (Schaeffer), as well as by the evidence of his motives for destroying the document. Finally, the jury was impressed, as were both courts below, by the documented contradiction of petitioner's testimony that he was absent from Cleveland between September 9 and 13. See the Statment, supra, pp. 11–12. The evidence of guilt fully supports the verdict.

2. Circumstantial evidence is in the same category as direct evidence. Circumstantial evidence may support a verdict of guilt even though it does not exclude every reasonable hypothesis of innocence. All that is required is that there be evidence which justifies a jury in finding guilt beyond a reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 139–140; *White* v. *United States*, 279 F. 2d 740 (C.A. 4), certiorari denied, 364 U.S. 850; *United States* v. *Young*, 291 F. 2d 389 (C.A. 6); *Sawyer* v. *United States*, 294 F. 2d 24 (C.A. 4), certiorari denied, 368 U.S. 916.

II

THE TESTIMONY OF SENATOR MCCLELLAN WAS PROPERLY ADDUCED BEFORE THE JURY

Both the government and the defense tried this case on the theory that the government was required to prove "pertinency" of the documents as part of its

case. The trial court was of the view that this issue of pertinency was for the jury. At the conclusion of the case the court determined as a matter of law that Congress was acting pursuant to a valid legislative purpose "in conducting an inquiry in respect of unlawful activities in labor-management relations" (R. 294). It submitted to the jury the question whether the sending of gifts to public officials and others was a type of practice which bore a reasonable relation to the inquiry being made, as well as the question of petitioner's knowledge of the inquiry (R. 303–304).

Petitioner did not object at the trial to the submission to the jury of the issue whether the sending of gifts was a type of practice which was relevant to the committee's inquiry. Nor did he object to the admission of Senator McClellan's testimony on the ground that it should have been heard by the trial judge out of the presence of the jury. Nevertheless, he now argues that the issue was for the court alone and that Senator McClellan's testimony as to the authority of the committee, its method of operation, and its interest in the operations of petitioner's union and the records sought should not have been adduced before the jury. It is the government's position that petitioner's acquiescence in permitting evidence of pertinency to be presented before the jury bars him from claiming error in that respect on review. Furthermore, it is our position that, even if the evidence of pertinency had been separately heard and determined by the court without a jury, the major portion of Senator McClellan's testimony could properly and

necessarily would have had to be presented again before the jury as bearing on the motive of petitioner to destroy the records. Particularly since the evidence that petitioner destroyed the records was in part circumstantial, it was an important part of the government's case to show that petitioner had a reason to destroy them. The interest of the committee in the particular records destroyed, as they bore both on the misuse of union funds and on the relationship of Senator Bender to the Teamsters, was, if knowledge of that fact was brought home to petitioner, clearly relevant on the issue of motive. Evidence of the committee's interest in the records thus had to be adduced before the jury and the witness best qualified to adduce it was the chairman of the committee. We set forth below a fairly detailed summary of Senator McClellan's testimony before discussing petitioner's contentions with respect thereto.

A. SENATOR MCCLELLAN'S TESTIMONY

1. *The scope of the investigation*

Senator McClellan was the first witness at the trial (R. 16). He identified the authorizing resolutions and the committee rules, and these exhibits were admitted into evidence without objection (R. 18, 21). He read the content of the initial resolution over an objection that "these records speak for themselves" (R. 19–20). The following then ensued (R. 20):

> Q. Now in general, Senator, could you state some of the particular acts and practices which

your committee looked into pursuant to this Senate resolution?

* * * * *

MR. KNACHEL [defense counsel]: My objection is that anything he says from now on in would be self-serving, your Honor.

THE COURT: No, they were public hearings, a matter of public record, what they investigated. How else could you establish what they did? I think it is within the realm of inquiry. You may answer.

MR. KNACHEL: Exception.

Senator McClellan then related the general nature of the investigations which the committee had conducted (R. 20–21). He testified, over defense counsel's objection, that the committee did not limit itself to compulsory process to fulfill its function, and he detailed the duties of its counsel and investigators (R. 22–24). He gave, without further objection, the purpose of the field offices and stated that the committee had investigated the Teamsters Union, its officials, and other persons connected with that union (R. 25).

2. The interim report

The committee's interim report was identified (R. 25–26). See *supra*, p. 7. When defense counsel announced he wanted "to object to the admissibility of any part of this report", the court directed the government to call the witness' attention to the particular part desired to be offered. Senator McClellan then simply stated, over objection, that the report contained special findings with respect to the Teamsters Union and certain legislative recommendations, and

the government limited its offer to those portions (R. 26). Senator McClellan summarized the legislative recommendations over a further objection (R. 27), and the government noted that the report had become a public record upon its filing in the Senate (R. 27–28). When the interim report was offered in evidence, with defense counsel objecting (without more), the court stated it had been received "insofar as it is pertinent to our issues" (R. 28). The report was not given to the jury.

3. *The "clean-up commission"*

Defense counsel did not object to testimony that the committee had issued subpoenas for the production of records in Ohio, but he interposed a baire objection to evidence that the committee investigated locals and affiliates of the Teamsters Union in Ohio, and issued subpoenas for this investigation (R. 28–29). When Senator McClellan was asked if, in August 1958, it came to his attention that the Teamsters Union intended to expend funds for a "clean-up commission" (R. 30), the following ensued (R. 30–31):

> MR. KNACHEL: Objection, your Honor.
>
> THE COURT: Well, would that be hearsay evidence? How did he hear it? I just don't quite get the purpose of it.
>
> MR. KIERNAN [prosecutor]: Information which would come to the attention of any investigative body would of necessity be hearsay, but it would give rise to that investigative body's subsequent decision to look into a particular matter.

THE COURT: You mean that was the basis for your inquiry?

MR. KIERNAN: That is right.

THE COURT: He may answer.

MR. KNACHEL: Objection.

Senator McClellan then related that he had been told by a Teamsters attorney that the union intended to expend funds for a so-called "clean-up commission" to investigate corruption within the union. This, the witness stated, interested the committee because Mr. Hoffa, Provisional President of the Union, had testified before the committee that he would clean up the improper practices within the union, and because the commission, with its attendant expense, had been appointed for this purpose. The court permitted testimony, over a general objection which it interpreted as directed to materiality, that former Senator George Bender was appointed as the commission chairman (R. 30–33). When the witness was asked if reports had come to the committee's attention causing it to investigate the relationship between Bender and the Teamsters, petitioner's counsel objected, stating, "May I say, Your Honor, aren't we sometime during this trial going to have any witness to testify directly rather than all this hearsay?" (R. 33–34). The Senator next testified over general "objection" that investigator Sheridan was directed to pursue a study of the Bender appointment in connection with the investigation under way in Ohio (R. 34).

4. *The transcript of Sheridan's testimony*

Senator McClellan identified a printed transcript of a committee hearing, noting that Sheridan testified

before the committee on September 17, 1958 (R. 34–35).[10] The Senator was asked to refresh his recollection from the document and state if Sheridan had testified to a visit to Cleveland. When petitioner objected, the court inquired, "Can't the witness Sheridan himself testify that he made this visit?" The government responded, "I am trying to avoid recalling the Senator. Before we get certain matters in evidence directly I would like the Senator to be able to testify as to their pertinency" (R. 35). The following occurred (R. 35–36):

> MR. KNACHEL: I object.
>
> MR. KIERNAN: It is merely a matter of the order of proof which is discretionary with the Court.
>
> THE COURT: Well, there is some merit to it. Of course the Government must prove that these matters were pertinent to their inquiry, that they bore a reasonable relation to the matter under investigation, and that is rather difficult to prove except in the way that it is being done.
>
> That was one of the elements of the offense that these were matters which the committee had under investigation and they were relevant and pertinent to their inquiry and that they were entitled to the records and papers which are the subject of this lawsuit in connection with that inquiry. I assume that is the basis?
>
> MR. KIERNAN: That is it.
>
> THE COURT: I will permit the Senator to answer.

[10] Petitioner in his opening statement had made an issue of the fact that he had no right to cross-examine Sheridan at the committee hearing (R. 362).

MR. KNACHEL: Your Honor, it would seem to me that you try a lawsuit by subpoenas issued and the witness that they served them on.

THE COURT: This is a matter of public record. This isn't hearsay, it is a matter of public record.

MR. KNACHEL: That record isn't in evidence.

MR. KIERNAN: The record is being used to refresh the witness' recollection.

When the court suggested that the record ought to be in evidence, the government stated that it was agreeable to offering it in evidence or allowing the witness to refresh his recollection from the record. Petitioner objected to both procedures and the prosecutor stated, "To suit the convenience of the Defense Attorney we will offer it" (R. 36). The witness testified that Sheridan had told the committee about his visits to petitioner in September 1958 (R. 37). When the witness suggested that he could read the testimony, the court responded: "Well read it", and said to the prosecutor, "Tell the Senator that what you are interested in knowing is what Mr. Sheridan testified as it relates to the knowledge the committee had of the pertinency of this matter" (R. 37). The transcript of Sheridan's testimony before the committee concerning the September 9 and 13 visits to petitioner were read to the jury, again over a general "objection" (R. 38–41).

3. The identification of the recipients of gifts

Senator McClellan identified Mr. Dave Beck as former President of the Teamsters, Mr. English as its Secretary-Treasurer, Mr. Hoffa as its Provisional

President, Mr. Bender as a former Senator and Mr. Dorfman as connected with an insurance agency which had done considerable business with the Teamsters.[9] At the outset of this phase of the case, petitioner objected generally. The Senator testified that Mr. Beck had been of concern to the committee but that he did not know Mr. Connell or Mr. Bliss (R. 41–43). The Senator then read, over a general objection, the following reference to Dorfman in the interim report (R. 43–44):

> Or Paul (Red) Dorfman, who reached ascendancy in the Chicago labor movement after the murder of his predecessor and who has maintained a continuous association with Chicago mobsters.

6. The conclusions of Senator McClellan

The witness also stated, over general objection, that under its resolution the committee was interested in securing information regarding domination of unions by racketeers, that the sending of gifts by the Joint Council indicated a relationship other than mere acquaintanceship since frequently such gifts indicated attempted improper influences and, in some instances, a conflict of interests. He asserted that it was of concern to the committee to know the past relationship between Senator Bender and the organization that he was preparing to "clean up" (R. 45–46). His testimony concluded as follows (R. 45–46):

[9] The identification of the names on the invoice was discussed in a pretrial conference (R. 352–358). Petitioner took the position that none of the names was pertinent (R. 356).

Q. Now, in the event the invoice which you testified about had, in fact, originally contained the list of names which were read into the record, and in the event, Senator, that those names were removed from the invoice, would that tend to obstruct the business of the committee?

MR. KNACHEL: Objection, your Honor.

THE COURT: You may answer.

A. It would prevent the committee from getting that information which was pertinent to its inquiry, unless the committee might be able to get it elsewhere; and even if it could get it elsewhere, it would tend to obstruct, because it would make the committee's duties and work more burdensome by reason of not being able to get it where it was expected to be found and where it originally was.

MR. KNACHEL: I move to strike the answer.

THE COURT: It may remain.

Senator McClellan also concluded, over the same general objection, that, if the sheets of paper actually existed as Sheridan had stated, withholding it from the committee would hinder and prevent the committee from carrying out its duties (R. 46).

B. THE PROPRIETY OF ADDUCING SENATOR MCLELLAN'S TESTIMONY BEFORE THE JURY

1. *On the issue of pertinency*

As is evident from the action of the court throughout the trial and its instructions at the conclusion, the trial court considered that the issue of pertinency was for the jury and hence that the evidence on that subject was for the jury. At the trial, petitioner did not object to this procedure; he never claimed that

Senator McClellan's testimony should be adduced before the court alone. Petitioner's objections in most instances were made without explanation of the grounds thereof. His only specific objections were three: (a) the authorizing resolution was the best evidence of the committee's functions; (b) testimony beyond the authorizing resolution was self-serving; and (c) the information that the chairman received concerning former Senator Bender was hearsay. The court interpreted many of the general objections to be based on the ground of relevancy and overruled them because the evidence was plainly relevant to the issue of pertinency. Yet petitioner never once suggested that even if relevant to this issue the evidence was not for the jury. And as we pointed out above, he was content to allow the jury to decide the pertinency issue (R. 307). Petitioner cannot pursue one course at the trial and when it has proved unprofitable shift his position on appeal. *Johnson* v. *United States*, 318 U.S. 189, 201.

It is particularly fitting that petitioner should be held to his acquiescence at the trial in the presentation of evidence of pertinency before the jury since there is a cloudy area in this field as to when evidence of pertinency may be heard before the jury. It is true that this Court has held that the trial court normally should determine as a matter of law whether questions asked by a subcommittee are pertinent to the subject under inquiry. *Braden* v. *United States*, 365 U.S. 431, 435–437; *Sinclair* v. *United States*, 279 U.S. 263, 299. A trial judge does not, however, always have to exclude the jury when evidence is pre-

sented as to an issue of law. He has an area of discretion as to whether to hear the evidence outside of the presence of the jury. *See Holt* v. *United States*, 218 U.S. 245, 248-250; *Keeney* v. *United States*, 218 F. 2d 843, 849 (C.A.D.C.) (concurring opinion). And even the submission of pertinency questions to the jury is not unknown. Where, after an initial determination by the trial judge that the matter is pertinent, there is left a question of fact bearing on the basis for this determination, it has been held proper to present this mixed question of fact and law to the jury. *United States* v. *Orman*, 207 F. 2d 148, 156 (C.A. 3); *cf. Christoffel* v. *United States*, 338 U.S. 84. Submission of such issues to the jury usually favors the defendant, and accordingly, the appellate courts have refused to reverse where timely objection to this mode of proceeding was not made. *United States* v. *Marzani*, 194 F. 2d 623 (C.A. 2), certiorari denied, 343 U.S. 965.[1] There was nothing in this testimony which would have confused the jury or biased them unfairly against petitioner in deciding the contested factual issue in this case—*i.e.*, whether petitioner destroyed or concealed the records. Accordingly, petitioner, who permitted the evidence of pertinency to be adduced before the

[1] Petitioner's reliance on *Keeney* v. *United States*, 218 F. 2d 843 (C.A.D.C.), is misplaced. The jury heard evidence linking the defendant to a worldwide communist movement and to acts of espionage and sabotage. Both sides there recognized that the issue of pertinency was for the court and defense counsel specifically and repeatedly requested that the court hear testimony on this issue outside of the presence of the jury.

jury without objection and who acquiesced in the submission of the issue to the jury, should not now be permitted to claim prejudice from this method of handling the case.

Petitioner's claim in this connection that he was deprived of his right to have the trial court rule on pertinency is without substance. At the very minimum, the trial court, by submitting the issue to the jury, ruled that the evidence sufficiently showed pertinency to warrant submission of that issue to the jury. Moreover, petitioner made no request to have the court rule on this issue. Finally, it is sufficient that an appellate court alone rule on any issue of law and, as has been pointed out above (*supra*, pp. 31–33), the documents concealed or destroyed were plainly pertinent to an authorized committee investigation.

2. *On other issues in the case*

Aside from the fact that petitioner acquiesced in the trial judge's view that the testimony of Senator McClellan as it bore on the pertinency of the records should be heard before the jury, petitioner's objections to the taking of this testimony before the jury are invalid because most of this testimony, including the parts about which petitioner most complains, would have had to come before the jury in any case. Even if the judge had conducted a hearing outside the presence of the jury and had concluded that the documents sought were relevant to the inquiry, still the nature of the committee investigation, the authority of Sheridan to act for the committee, and the significance of the names on the destroyed records in

relation to the committee's inquiry would have had to be developed before the jury. To make out a case under the obstruction statute the government was compelled to prove that an investigation was in progress and that petitioner had notice of such an inquiry and made an effort to interfere with it. *Pettibone* v. *United States*, 148 U.S. 197. There is no method of trying a case of this character without informing the jury about the nature of the investigation and the subject matter of the committee's inquiry—either by evidence or by instructions from the court as to the nature of the investigation. And in this connection, with respect to Sheridan's testimony before the committee, the government also had to show Sheridan's authority to demand the records. See *infra*, pp. 51–53.

Beyond this, the major portion of Senator McClellan's testimony was properly adduced before the jury because it bore on the question of motive. The evidence that petitioner destroyed the records was circumstantial to the extent that no one testified that he actually saw petitioner destroy the records. It was therefore a proper part of the government's case to show that petitioner had a motive to destroy them. *Moore* v. *United States*, 150 U.S. 57; *Zamloch* v. *United States*, 193 F. 2d 889, 892, certiorari denied, 343 U.S. 934; 1 Wharton, *Criminal Evidence* (12th ed.), § 166; cf. *Glasser* v. *United States*, 315 U.S. 60, 81; *Williamson* v. *United States*, 207 U.S. 425, 451. That motive, in the government's view, was that, to petitioner's knowledge, the committee was interested in discovering both that the union was using union funds to make expensive Christmas gifts and that

Senator Bender, who was to head the "clean-up commission", had had prior relations with the Teamsters and that the committee was interested in obtaining records which would document such facts. It is true that to establish petitioner's motive the government had to show, not only that the committee was interested in these matters, but that petitioner knew that the committee was interested. Petitioner is incorrect, however, in his contention that the testimony on the subjects of interest to the committee had no bearing on the issue of his motive and knowledge. Unless there is an admission of knowledge—and there was none here until petitioner took the stand—the first step in showing knowledge of certain things is to prove that those things actually existed. The evidence cannot all go in at the same time, and the jury first had to know in what the committee was interested in order to decide whether petitioner knew of such interest. Petitioner's remark to investigator Sheridan after the records were found mutilated, that "You have your job to do. I have mine" is fairly meaningless in itself; it becomes full of meaning, however, against a background of knowledge as to what Sheridan's job was in relation to the Teamster records in Cleveland.

Moreover, in the circumstances of this case the claim that Senator McClellan's testimony on the subjects of interest to the committee had no tendency to prove petitioner's knowledge of the committee's concern with the destroyed records is particularly untenable. Petitioner had been served with a subpoena to pro-

duce records on March 21, 1958, three days before the interim report of the committee, almost six months before Sheridan visited the Ohio office of petitioner's union and requested the records subsequently left with petitioner for photostating. It is a reasonable inference for a jury to make that in the interval between the subpoena and Sheridan's second visit—at the very least, in the interval between Sheridan's first and second visit—the responsible head of a union under investigation and subpoena would acquaint himself with the subjects of interest to the committee, matters which had been detailed in a public document open to the press.

It so happens that when petitioner took the stand he did not contest knowledge of the inquiry. He testified that, although he had "no recollection of such a thing as an interim report," he had heard that the committee made reports to the Senate and knew what he read in the papers about special findings with respect to the Teamsters Union (R. 255–256). The government could not, however, know this when it was putting on its affirmative case. It had to present evidence of knowledge and motive as part of its own case and Senator McClellan's testimony was part of that proof.

It is in this light that petitioner's specific objections to Senator McClellan's testimony must be viewed. When so judged, it becomes evident that with one minor exception, which was not prejudicial, the testimony was properly before the jury, both as to pertinency and as to motive.

C. THE ADMISSIBILITY OF SPECIFIC TESTIMONY

1. *The subject of inquiry*

Petitioner contends that proof of the scope of the committee's inquiry was limited to the Congressional resolution and that other evidence on this issue was inadmissible. As this Court has recognized, the authorizing resolution is only one point of reference as to the subject of an inquiry being undertaken by a committee at a particular time. The proper meaning of the authorization must be determined by the course of congressional action (see *Wilkinson* v. *United States*, 365 U.S. 399; *Barenblatt* v. *United States*, 360 U.S. 109, 117) and those best qualified to describe the general nature of an investigation are the persons familiar therewith. This is the reason that evidence by committee members or counsel has been held admissible. *United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2), certiorari denied, 343 U.S. 965. See also *Deutch* v. *United States*, 367 U.S. 456, where an attorney for the committee testified concerning earlier hearings. This is not "self-serving"—the objection made by petitioner at the trial—any more than any testimony by a person as to what he has done is "self-serving".

In relation to the issue here, whether the records of Christmas gift expenditures by the union bore a reasonable relation to the inquiry and even more in relation to petitioner's motive to destroy the records, it was manifestly necessary to be more specific than the general resolution authorizing an investigation of criminal and other improper activities by unions. It

was necessary to show that the committee was justified under that resolution in inquiring into the use of union funds for improper purposes. The recommendations of the interim report and Senator McClellan's testimony both show that the committee was interested in the expenditure of union funds for improper purposes. The interim report also indicates that Congress as a whole was aware of the nature of the committee's investigation. The report was admitted for a limited purpose (See *supra*, pp. 37–38) and did not go to the jury. The government attorney in his closing argument told the jury that the sole reason for mentioning a portion of the interim report "was to show the Committee was interested in certain individuals in the Teamsters Union, and that the report had been issued, and the probability that the defendant, Mr. Presser, would have known of the report and what the Committee was interested in." (R. 335). The judge refused to send the interim report to the jury (R. 212–213).

2. Sheridan's testimony before the committee

Petitioner complains (Br. 31–32) of the reading into evidence of a transcript of Walter Sheridan's testimony before the committee concerning his visits to petitioner on September 9 and September 13, 1958, on the ground that it bolstered Sheridan's similar testimony at the trial (Br. 31–32). It was, however, relevant both to the issue of pertinency and to the basic issue whether petitioner's acts violated the statute to show that Sheridan, in requesting the documents (ultimately left with petitioner for photostating

and destroyed by him), was acting for the committee and under its authority. The government attorney recognized that as to this aspect of the case the Senator's testimony was possibly out of proper order, but noted that he was trying to avoid recalling the Senator. It was on this basis that the court, in its discretion, allowed the evidence as to Sheridan's authority to go in at that time (see *supra*, pp. 40–41 (R. 35–36)).

The reading of Sheridan's testimony was suggested by the Senator and agreed to by the court after the government offered to use the testimony as a means of refreshing the recollection of the witness. The purpose of this reading was, however, made clear when the court said to the prosecutor, "Tell the Senator that what you are interested in knowing is what Mr. Sheridan testified as it relates to the knowledge the committee had of the pertinency of this matter" (R. 37).

It is clear from these facts that this evidence was not introduced to corroborate Sheridan's subsequent trial testimony and that it did not prejudice petitioner. The transcript of Sheridan's testimony before the committee (which did not go to the jury) was plainly introduced on the issues of pertinency and of Sheridan's authority to show that the information sought from petitioner bore a reasonable relationship to the matter under investigation and that Sheridan was acting under authority of the committee. To the extent that it showed Sheridan's authority from the committee, the evidence was properly before the jury, irrespective of the issue of pertinency.

There was no reason why the government would wish to corroborate Sheridan's future trial testimony by his evidence before the committee. Sheridan made notes of the invoice and of the paper memorandum on his first visit (R. 69). These notes were the chief corroboration of his trial testimony, not his prior recital to the committee. Petitioner did not dispute the facts reported by Sheridan to the committee; his main defense was that during the four days between Sheridan's visits he was not in exclusive control of the documents and that he had been out of town during the major portion of that time. The contradiction was not between petitioner and Sheridan, but between petitioner (who testified he was visiting James R. Hoffa in Washington between the Sheridan visits) and telephone company records, placed in evidence in rebuttal, which disclosed two person-to-person calls from Hoffa in Washington to petitioner in Cleveland during this period of time.[13]

3. Identity of the recipients of gifts

Although he concedes that "it was incumbent upon the Government to prove that the proper names on the documents demanded * * * were relevant or pertinent to the subject under inquiry by the Committee" (Br. 25), petitioner objects to the testimony identifying the persons to whom the champagne buckets had been given, and the use of the committee's interim report in this connection (R. 41–45).

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[13] *Mellon* v. *United States*, 170 F. 2d 583 (C.A. 5), relied on by petitioner, involved a direct contradiction between the defendant and the chief government witness, so that the corroboration by prior statement was crucial.

The evidence shows that six of the eight named recipients were identified in Senator McClellan's testimony. Of those identified, four were described simply as Teamsters officials—Dave Beck as a former Teamsters President, English as a Secretary-Treasurer, Hoffa as Provisional President, and Brennan as Vice-President. George Bender was identified as a former United States Senator. Connell and Bliss were not identified. Subsequently, petitioner himself described Bliss as a State Chairman of the Republican Party. Only Dorfman was characterized as a person of bad repute—being described from a reference in the interim report as follows (R. 44):

> Or Paul (Red) Dorfman, who reached ascendancy in the Chicago labor movement after the murder of his predecessor and who has maintained a continuous association with Chicago mobsters.

This line of testimony was not offered to attack petitioner's character but because it was relevant to the question of pertinency and even more to the issue of petitioner's motive to destroy the papers. See *United States* v. *Weber*, 197 F. 2d 237 (C.A. 2), certiorari denied, 344 U.S. 834. The identity or at least the position of the individuals listed in the records was directly relevant to the issue of motive. Obviously, a person who knew a committee was interested in misuse of union funds could have an interest in keeping from the committee evidence that union funds were going for expensive gifts for union officers. One who knew that the committee was interested in a "clean-up commission" would have a reason to destroy

records showing prior gifts to the head of that commission. One who was aware that the Teamsters might be forced to discharge any union official who was associated with anyone with a bad reputation[*] would have a motive to keep the committee from learning the names of persons with such reputations who had received Christmas gifts. This testimony was thus properly before the jury irrespective of the correctness of the judge's ruling on pertinency.

The government limited its use of this testimony to the matter to which it was strictly relevant. The government did not attempt to capitalize on the testimony either in closing argument or in its cross-examination of petitioner's character witnesses.

At the conclusion of the government's case, during a discussion as to which exhibits the jury should see, the trial court had no recollection of any mention of Dorfman. As noted, it concluded that the interim report should not be shown to the jury because it was too remote. At that time, petitioner himself did not consider the Dorfman reference to be of sufficient importance to recall it to the court or move for a mistrial. It has assumed magnitude only since the case came on appeal.

4. *The conclusion as to distinction*

The only testimony of Senator McClellan to which petitioner objects and which would not have gone before the jury on issues other than pertinency is the Senator's testimony that failure to obtain the invoice

[*] Petitioner admitted in his testimony that he believed this to be likely (R. 258-262).

and memorandum would hinder and obstruct the work of the committee (R. 45–46). It is entirely clear that petitioner could not have been prejudiced by the admission of this testimony which in no way bore upon petitioner's knowledge and wilfulness in destroying or concealing documents sought by the committee. The wilful destruction or concealment of pertinent documents plainly constitutes at least an endeavor to impede the committee proceedings. Senator McClellan's testimony as to the effect of petitioner's action was therefore significant only in its bearing upon the pertinency of the documents. But its admission could not have been prejudicial to a fair determination of the issue of pertinency whether this issue was to be considered by the trial judge or the jury, for the other evidence overwhelmingly established the pertinency of the invoice destroyed and the memorandum concealed.

III

THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT INFLAMMATORY AND WAS BASED ON PROPER INFERENCES FROM THE EVIDENCE

Petitioner, who made no objection at the trial to the closing argument, now complains that it was unfair (Br. 36–38).

1. He claims that the mention of some of the specific names on the mutilated invoice constituted a reference to "criminals", "racketeers", "unsavory characters" and "persons of bad reputation" (R. 343–344, 347–348). Examination of the argument shows that the prosecuting attorney went out of his

way to caution the jury about such matters (R. 344):

> Now, the purpose for bringing out whether or not Beck, Hoffa, Brennan, or Dorfman, or anyone else, has a bad reputation is not so that it will reflect in any way on the defendant, and it shouldn't, because anyone who had been in the labor movement or any other movement where there would be people who might have a bad reputation, you couldn't help of necessity but have some contact with them. That was not our purpose in bringing it out, and we don't want it considered against the defendant in that way. The purpose for our bringing it out, you will recall Mr. Presser testified from the minutes of the Joint Council meeting of August 14, 1958 * * * he was afraid that he might be fired from his job by the monitors, and that the cause of the firing could be an association with people of bad reputation. Now, we wanted to show that some of the people in this organization did have a bad reputation, or at least what might be considered a bad reputation, and that this would be another motive for Mr. Presser destroying the document or concealing his association with them from the public.

Thus, the summation made it crystal clear that the testimony with respect to people of bad reputation was to be considered only in regard to the question of petitioner's motive based on his own testimony, and for no other reason. This summation was totally unlike the argument criticized by this Court in *Viereck v. United States*, 318 U.S. 236, 247. More-

over, petitioner did not request the court to limit this testimony in any manner (R. 387–388).

2. Petitioner also claims that the prosecuting attorney misstated the testimony of the champagne bucket salesman, Charles Schaeffer. The record shows that Schaeffer testified that petitioner called him in September 1958 and asked him whether he, Schaeffer, had any records of anything that had been sold to him or the Teamsters Union in the form of gifts and that particular reference was made to champagne masters (*i.e.*, buckets). Schaeffer then called the selling company, and in turn asked for duplicate copies of any invoices pertaining to such sales. He was not able to obtain these copies from the company and so informed petitioner (R. 209). The prosecutor's argument that petitioner asked the salesman to obtain other copies pertaining to this gift was a fair interpretation of this testimony (R. 341–342, 384). Significantly, petitioner made no objection to this argument nor did he mention it when he referred to the salesman in his closing statement (R. 376).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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